Supreme Court of the United States

OCTOBER TERM, 1941.

IN THE MATTER

of

THE REORGANIZATION OF THE ELEVENTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI.*

I.

The Opinions of the Courts Below.

The opinions of the trial court were not officially reported. They appear in the Record at pages 127 and 197.

The opinion of the Court of Errors and Appeals is reported in 130 N. J. Eq. 414, and appears in the Record at page 256.

II.

Jurisdiction.

1. The jurisdiction of the Supreme Court of the United States is invoked under Section 237 (b) of the Judicial Code, and under Rule 38, paragraph 5 (a) of the Court.

2. The day of the entry of the remittitur and decree of affirmance is October 3, 1941, on which date it was filed in the Court of Errors and Appeals (R., pp. 275, 276). It bears date September 19, 1941, which is the date of the opinion (R., p. 256). This is in accord with the state practice, under which the attorney prepares the remittitur as of the date of the filing of the opinion in the appellate court and files the same without presentation to or order of the Court. It becomes effective on the date when filed.

> *Chambers* v. *Philadelphia Pickling Co.*, 82 N. J. L. 1, 2.

The remittitur bears the endorsement by the Clerk of the Court of Errors and Appeals "Filed Oct. 3, 1941" (R., p. 276).

3. The nature of the case and the rulings below bring the case within the jurisdictional provisions of Section 237 (b) of the Judicial Code for the following reasons:

(a) The claim of federal constitutional rights in relation to a full hearing was raised on appeal (R., p. 13, par. 5) after the trial court had refused a hearing (R., pp. 140 and 253). The claims were specifically passed upon and denied by the New Jersey Court of Errors and Appeals in its opinion (R., p. 256).

(b) The claim of federal constitutional rights in relation to the credit of share values against mortgage loans in reduction thereof was made in the first pleading filed in the trial court (R., pp. 23 and 31). The same claim was reiterated on appeal (R., p. 9).

4. The cases believed to sustain the jurisdiction are as follows:

Morgan v. *United States,* 298 U. S. 468;
Shields v. *Utah Idaho Central Railroad Co.,* 305 U. S. 177;
Baltimore & Ohio Railroad Co. v. United States, 298 U. S. 349;

which establish that the due process clause assures a full hearing before the Court empowered to perform the judicial function involved, which includes the right to introduce evidence and have judicial findings based upon it.

Treigle v. *Acme Homestead Assn.,* 297 U. S. 189,

establishes that even in connection with institutions affected with a public interest, private rights may not be prejudiced unless the object to be achieved is in fact in the public interest.

III.

Statement of the Case.

An adequate statement of the case is presented under heading "A" of the petition for writ of *certiorari.* In the interest of brevity, the statement is not repeated here.

IV.

Specification of Errors.

1. The Court of Errors and Appeals erred in finding and holding that its refusal to afford the petitioners an opportunity for a full hearing on the merits, was not in contravention of the provisions of the Fourteenth Amendment.

2. The Court of Errors and Appeals erred in finding and holding that the Plan did not deprive the petitioners of property without due process of law.

V.

ARGUMENT.

Summary of Argument.

Point A. The petitioners were deprived of a trial, because there was no hearing, and because they were prevented from introducing evidence material to the issue, and because they were given no opportunity to cross examine witnesses.

Point B. The petitioners were deprived of their property without due process of law, because members of the Association other than the petitioners were preferred over the petitioners.

POINT A.

The petitioners were deprived of a trial.

The statute, R. S. 17:12-106 (Appendix, p. 15), provides that upon filing of the petition of dissent "the court shall hear and dispose of the matter summarily." The statute directs that a hearing be held. The record may be searched in vain for anything bearing the semblance of a hearing. Upon the filing of the petitions of dissent on June 18, 1940, an order was advised, returnable June 25, 1940 (R., p. 28), directing the Association to show cause before the Chancellor "why the court should not make an

order suspending the operation of such Plan *until a hearing may be had on such petition.*" Upon the return day of that order, affidavits were presented by the Association. There was no hearing.

The Court below decided the case on argument of counsel. The Court heard no witnesses. There was no opportunity for cross examination.

The petitioners were entitled to a judicial determination on the facts and issues they raised.

> *Baltimore & Ohio Railroad Co.* v. *United States of America,* 298 U. S. 349.

A "hearing" is "the hearing of evidence and argument".

> *Morgan* v. *United States,* 298 U. S. 468;
> *Shields* v. *Utah Idaho Central Railroad Co.,* 305 U. S. 177.

The language of R. S. 17:12-106 makes it apparent that what was to be avoided was an answer to the petition, other pleadings, orders of reference, and the like. Due process requires a full hearing *(Baltimore & Ohio Railroad Co.* v. *United States, supra).* A trial court should not be permitted to abandon the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. A hearing is designed to afford the safeguard that the one who decides shall be bound in good conscience *to consider the evidence,* to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations. See *Morgan* v. *United States, supra.* Upon the filing of the grounds of dissent, it was the trial court's duty to receive and consider the evidence supporting the grounds

and then, and only then, to make its decision. This was recognized in the initial order made by the trial court which required the suspension of the operation of the Plan "until a hearing" could be had on the merits (R., pp. 28, 29); the Court never acted on its order.

POINT B.

The petitioners were deprived of their property without due process of law.

Members of New Jersey building and loan associations are either borrowing or non-borrowing members. When one becomes a borrower on bond and mortgage from a building and loan association upon the pledge of shares, *he becomes a member of the association.*

> *Mechanic's Building and Loan Association* v. *Conover,* 14 N. J. Eq. 219, 224, affirmed, 17 N. J. Eq. 497.

Upon the insolvency of a building and loan association, the entire amount of the mortgage loan falls due, *no credit* being given the member for dues paid in.

> *Weir* v. *Granite State B. & L. Association,* 56 N. J. Eq. 234, and
> *Harris* v. *Nevins,* 68 N. J. Eq. 183, affirmed 68 N. J. Eq. 684.

The borrower is "in the first place, a member, and only in the second place, a borrower."

> *Thirteenth Ward B. & L. Ass'n* v. *Weissberg,* 115 N. J. Eq. 487, 493.

The statute (Title 17, Chapter 12, Revised Statutes) governing the affairs of building and loan associations evidences an intention that complete mutuality and equality characterize all transactions between the association and its members, and between the members *inter se*. The spirit of the statute is equal participation.

Bucsi v. *Longworth B. & L. Ass'n*, 119 N. J. L. 120, 124, 125.

The device adopted by the reorganization statute, and by the Plan, destroys that element of mutuality which was inherent at the inception of membership. It gives borrowing members full credit for dues paid on shares pledged as security for a mortgage loan, without compensating payments to other members. It does not appear that the measure adopted is one upon which the Plan depends for its successful operation. It does not appear that the device is to be applied only in those cases where preservation of the Association's lien and the safety of its investment requires it. On the contrary, it was stipulated that no investigation was made of either the values of the properties securing mortgage loans or the financial responsibility of the mortgage debtors (Exhibit S-4, R., pp. 194-196).

The provision in question affects only private rights. While, in a proper case, constitutional guarantees must yield to a proper exercise of the police power, the end which the legislature seeks to achieve must be in fact public, and the means adopted to attain that end must be reasonably adapted to the purpose of the law. The sole effect of the statute and the Plan is the disturbance of private rights.

Treigle v. *Acme Homestead Ass'n*, 297 U. S. 189.

Whether a statute is in fact enacted for an end which is public is a mixed question of law and fact.

Treigle v. *Acme Homestead Association, supra.*

The petitioners sought to introduce evidence to show that the object sought to be achieved was not in fact public. This they were denied (R., pp. 140, 253).

The petitioners insisted, in the courts below, that they were entitled to their day in court. They insisted that the constitution guarantees them the right, refused them below, to be heard on the factual issue they raised. They insisted that they had the right, refused them below, to adduce evidence to prove that building and loan associations are not in fact institutions vested with a public interest to the extent claimed for them; that they have changed fundamentally in nature since the enactment of the statutes originally intended to govern the conduct of their business; that they have changed so radically that the numerous cases cited to prove that they are institutions affected with a public interest are inapplicable. The petitioners insist that building and loan associations are no longer the *mutual* institutions conducted for *mutual* profit that they set out to be.

The petitioners asked the Court below for the right to introduce the necessary evidence within the issues of the case presented, and the Court refused to take the evidence. Their offer to introduce evidence was made to rebut the assumptions of fact relied upon, without proof, by the Association.

The Court below based its decision in part on the fact that the petitioners represented but a small part of the

total investment (R., p. 260, ll. 30-31). The petitioners had invested about $260,000 (R., p. 144, l. 40). There should not be one kind of due process for minority stockholders and another kind for majority stockholders.

Conclusion.

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers to the end that rights under the Constitution of the United States should be preserved, and accordingly that a writ of *certiorari* should be granted and this Court should review and reverse the decision of the Court of Errors and Appeals of the State of New Jersey.

Respectfully submitted,

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